IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR

CIVIL SECOND APPEAL No. 25 of 2005

MAM CHAND & ORS
V/S
DAYAKAURI

Mr. DL MOTHSARA with
Mr. KS GILL, for the appellant / petitioner

Date of Order : 24.1.2005

HON'BLE SHRI N P GUPTA,J.

ORDER

Heard learned counsel for the appellant.

It has been found by the learned Courts below, that the property in question was ancestral property. The present suit is a suit for partition filed by the widow of one of the brothers against the other brother, and his sons. It was pleaded by the defendants that they have sold the property before filing of the suit, therefore, the purchasers have also been impleaded as defendants no.6 and 7. Accordingly, the learned trial Court has passed a preliminary decree, directing the property to be divided half to half, and that the plaintiff be delivered separate possession of her share of the property. The learned Lower Appellate Court has also affirmed these findings.

It is contended by learned counsel for the appellant, that the plaintiff came with a specific case, that she is in actual physical possession of a portion of the property, while it has come on record that she had left the village after the death of her husband, and therefore, she is not in actual physical possession on any of the portion of the property. That being the position, when the plaintiff has come with a false case, being in actual physical possession, the suit could not be decreed.

The other submission made is that issue no.1 has wrongly been framed as a compact issue, and it should have been bifurcated in three parts, viz., as to whether the property in question is ancestral property, the other part should have been, that after death of the father, the plaintiff, and defendant no.1 have half to half shares, and the third part should have been, as to whether the plaintiff is entitled to separate possession of the half portion of the property.

The third submission made is that the agreement, Ex.A.1 dated 10.6.96 has wrongly been admitted in evidence, as it was inadmissible piece of evidence.

The next submission made is that since the defendant nos.6

and 7 are in actual physical possession of the property, they should not be dispossessed from the property in question.

I have considered the submissions.

Taking up the first submission, may be that the plaintiff came with a pleading about her being in actual physical possession on a specific portion of the property, which she failed to prove to be in her actual physical possession, but then the only relevant question was, as to whether the property is ancestral property, and if it is ancestral and unpartitioned property, then the burden was on the defendant no.1 to prove that the plaintiff was ousted from the possession, beyond requisite period of time, so as to establish the adverse possession of defendant no.1. In absence of any such pleading, the possession of the co-owner in the ancestral property is possession of all the co-owners, and therefore, even if the plaintiff was not in actual physical possession on the part of the property, in absence of any pleading of the ouster, it is of no consequence to non-suit the plaintiff.

Regarding splitting of issue no.1, suffice it to say, that in the issue no.1, the only question required to be decided was, as to whether the property, described in para-2 of the plaint, was the property of the plaintiff's father-in-law. Obviously, if the answer is to be in affirmative, then in the hands of the plaintiff, and defendant no.1, it becomes ancestral, and in absence of any other first class heir, the remaining part of the issue becomes merely consequential. Therefore, the issue no.1 was not required to be split.

So far admissibility of Ex.A.1 is concerned, in my view, that is wholly irrelevant, as if the property is required to be partitioned between the plaintiff, and defendant no.1, even if the defendant no.1 has sold a portion, beyond what falls to his share, that shall have to be reverted to the plaintiff. Obviously, therefore, the mere fact, that the defendants no.6 and 7 are in actual physical possession of the property is also of no consequence.

So far as the question about the property being ancestral is concerned, learned Courts below have appreciated the evidence in detail, and have also taken into account the admissions made by the defendant about the property being of his father, and the defendant having failed to establish, that the property of the father was some other property. That being pure finding of fact, and is not shown to be vitiated on any of the other grounds available under Section 100 CPC. In my view, the appeal does not involve any substantial question of law. The same is, therefore, dismissed summarily.

(N P GUPTA),J.

/tarun/